

No. 16459 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RALPH MEYER,

Appellant,

vs.

IRVING I. BASS, Trustee in Bankruptcy of the Estate of
Vensep, Inc., etc., Bankrupt, and DIVISION OF LABOR
LAW ENFORCEMENT,

Appellees,

IRVING I. BASS, Trustee in Bankruptcy of the Estate of
Vensep, Inc., Bankrupt,

Appellant,

vs.

RALPH MEYER,

Appellee.

OPENING BRIEF OF APPELLANT RALPH MEYER.

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RALPH MEYER, APPELLANT

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OPENING BRIEF OF APPELLANT RALPH MEYER.

Specification of Errors.

1. That the court erred in its opinion [Tr. of R. p. 59] as stated therein that the payment of state taxes by the Assignee should have been subordinated to the payment of wage claims.

2. That the court erred in its opinion [Tr. of R. p. 60] as stated therein that the payments of fees to the Assignee and his attorney and expenses actually incurred during the administration of the insolvent estate should have been subordinated to the payment of wage claims.

3. That the Division of Labor Law Enforcement is not a proper party to object to the Assignee's disbursements, as the wage claims were filed under Section 64a(2) of the Bankruptcy Act.

4. That the Division of Labor Law Enforcement was not prejudiced by the Assignee's disbursements.

5. That the Assignee should not be surcharged for the disbursements made by him during administration of the insolvent estate.

Jurisdiction.

The dispute upon which this action is based was heard and decided originally in the Bankruptcy Court. Both the United States District Court and the United States Court of Appeals for the Ninth Circuit have jurisdiction over this matter by virtue of Section 24a and b of the Bankruptcy Act (11 U. S. C. Sec. 47), which provides in part:

“The United States courts of appeal . . . are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdiction in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise or reverse, both in matters of law and in matters of fact. . . .”

Facts.

Vensep, Inc., a California corporation, owned, as its sole asset, a restaurant and cocktail lounge located at 3816 South Sepulveda Boulevard, Culver City, California. [Tr. of R. p. 40.] Said business was operated by said corporation under a liquor license issued [Tr. of R. p. 41] by the California Department of Alcoholic Beverage Control (hereinafter for convenience referred to as "Department").

In connection with said operation, Vensep, Inc., incurred liability for taxes to the United States of America, to the California State Board of Equalization (hereinafter for convenience referred to as "State Board,") and to the California Department of Employment [Tr. of R. p. 41] (hereinafter referred to as "Department of Employment"). Vensep, Inc., also incurred liability for payment of wages to its employees. [Tr. of R. p. 42.]

On May 29, 1957, Vensep, Inc., being insolvent, executed to Ralph Meyer (hereinafter for convenience referred to as "Assignee") a General Assignment for benefit of its creditors. [Tr. of R. p. 40.]

Assignee took possession of the business of Vensep, Inc., inventoried the assets, ascertained that the reasonable market value of the furniture, furnishings, fixtures, and equipment of the restaurant and cocktail lounge amounted to less than the unpaid balance of the purchase price thereof. There being no purpose to be accomplished by retaining said property, and consequently increasing expenses to the estate, Assignee sold to the lessor, on June 25, 1957, whatever equity he could have claimed in or to said property for the sum of \$300.00 cash plus a waiver of administration rent in the sum of \$990.00 (being a pro-

ration of the \$1100.00 monthly minimum, rental provided for by Vensep, Inc.'s lease). Concurrently with said sale, Assignee surrendered possession of the business premises to the lessor. [Tr. of R. p. 8.]

On July 8, 1957, Assignee sold the on-sale liquor license of Vensep, Inc., for the sum of \$5800.00. [Tr. of R. p. 41.] On July 11, 1957, lessor purchased the merchandise and supplies of Vensep, Inc., for the sum of \$960.08. [Tr. of R. p. 9.]

The Department refused to transfer the liquor license to the purchaser until the taxes due from the Assignor to the State taxing agencies had been paid. Therefore, as condition precedent to transfer of liquor license, Assignee paid the demands of the Department of Employment, in the sum of \$1655.08, and the State Board, in the sum of \$1746.30, which represented the indebtedness of Vensep, Inc., to said agencies. [Tr. of R. p. 41.]

Neither the Division of Labor Law Enforcement nor any of the wage claimants filed any claim or notice thereof with the Assignee. [Tr. of R. p. 34.]

In connection with taking possession, inventorying, safeguarding, and liquidating the assets, Assignee expended the reasonable sum of \$612.32 in the following manner [Tr. of R. pp. 41, 42]:

Jack's Key Shops—change of locks	\$ 19.17
I. Bales—inventory and adjustor services	73.68
Recordation, signs and files	16.40
Southern California Water Company administration utilities	6.70
Richard S. Johnston—insurance	105.27
Ralph Meyer—office expenses: clerical, secretarial, stamps, stationery, storage, telephone	141.10

Assignee paid to himself a fee of \$423.70 or 6 per cent of the net realization from liquidation of the assets. [Tr. of R. p. 41.] The Assignee also paid the sum of \$250.00 as attorney's fees to Dorothy Kendall.

After liquidation of the assets, on July 17, 1957, an Involuntary Petition in Bankruptcy was filed against Vensep, Inc.; adjudication was entered on August 16, 1957. [Tr. of R. p. 40.]

On April 28, 1958, the Division of Labor Law Enforcement, pursuant to Section 64a(2) of the *Bankruptcy Act*, filed a claim for \$7662.85 in the bankruptcy estate on behalf of employees of Vensep, Inc. [Tr. of R. p. 23.] Said claim did not assert any priority under *California Code of Civil Procedure*, Section 1204 and did not assert any lien right under Section 67c of the *Bankruptcy Act*. [Tr. of R. p. 23.]

Issues.

1. Were the payments by Assignee to the Department of Employment and State Board proper?
2. Is the Division of Labor Law Enforcement prejudiced by the disbursements of Assignee's administration expense and fees?
3. May the Division of Labor Law Enforcement, having filed wage claims solely under Section 64a(2) of the *Bankruptcy Act*, object, as wage lien claimants, to Assignee's disbursements?
4. Should the Assignee be surcharged for payments made to the state taxing agencies which were required as a condition precedent to the transfer and sale of the liquor license?

ARGUMENT.

I.

A Liquor License Is a Privilege Granted, Controlled, and Regulated by the State.

A. There is no inherent right to sell intoxicants, and a license to sell intoxicants is a permit to do what is otherwise unlawful

Irvine v. State Board of Equalization, 40 Cal. App. 2d 280;

Moore v. State Board of Equalization, 76 Cal. App. 2d 758;

People v. King, 115 Cal. App. 2d Supp. 875;

Hansen v. State Board of Equalization, 43 Cal. App. 2d 176;

Saso v. Furtado, 104 Cal. App. 2d 759;

and the governing authorities may grant the privilege upon such terms and conditions as it may determine are proper.

People v. Jemnez, 49 Cal. App. 2d Supp. 739.

It is the type of property which the State, under its police power, has the power to control and regulate.

Cooper v. State Board of Equalization, 137 Cal. App. 2d 672.

And the constitutional right of a person to engage in business does not apply to one desiring to engage in the retail liquor traffic; but before so engaging, one must apply for a permit to the sovereign power, which power has retained to itself the right to permit or withhold the right altogether or grant the permit upon such conditions as it pleases.

Denton v. Vann, 8 Cal. App. 677.

The State has the exclusive right and power to . . . regulate the sale and purchase of intoxicating liquor.

California Constitution, Article XX, Section 22.

B. Because a liquor license is a privilege controlled and regulated by the State and granted upon the terms and conditions believed by the State, through its administrative agency, to be in the best interests of the public welfare, the requirement that taxes owed by a licensee to the State be paid as condition precedent to the transfer of the liquor license is a proper and reasonable exercise of the power to control and regulate.

Since 1955, the Department of Alcoholic Beverage Control (successor agency to the State Board in governing and administering liquor licenses) has required the payment of all taxes owed by any licensee which may have become due under the Alcoholic Beverage Control law, the Sales and Use Tax law, the Personal Income Tax law, the Bank and Corporation Tax law, or which may become due under the Unemployment Insurance Code. Any person becoming a licensee of a liquor license issued by the Department becomes one subject to this requirement of payment of taxes as condition to renewal or transfer of license and holds the license subject always to the trust impressed upon the value of the license for payment of such taxes, even as a mortgagor holds mortgaged property subject to the lien of the mortgage. This control would be proper by rule of the Department, even without express statute.

C. The Department refused to transfer the license until the taxes due to the State had been paid. This refusal of the Department was not only a reasonable exercise of its regulatory power, but was a benefit to the State in insuring collection of taxes.

The Assignee paid the taxes and thus realized a material value to the estate. Had the Assignee refused to make the payments of taxes, as required by the Department, the license could not have been sold and a substantial asset would have been lost or frozen. By payment of the taxes, an equity was saved.

II.

In the Interest of Public Welfare, the Department of Alcoholic Beverage Control Requires, as Condition to Transfer of License, the Payment of All Taxes Due to the State.

A. "The Department may refuse the renewal or transfer of any license when the applicant is delinquent in the payment of any taxes due under the Alcoholic Beverage Tax law, the Sales and Use Tax law, the Personal Income Tax law, or the Bank and Corporation Tax law, when such tax liability arises in full or in part out of the exercise of the privilege of an alcoholic beverage license, or any amount due under the Unemployment Insurance Code when such liability arises out of the conduct of a business licensed by the Department of Alcoholic Beverage Control."

California Business and Professions Code, Section 24049.

In many instances, permissive conditions in statutes are given mandatory meaning.

Goodman v. Board of Education, 48 Cal. App. 2d 731.

The work "may" may be mandatory

Carter v. Seaboard Finance Co., 33 Cal. 2d 564

and permissive words may be interpreted as mandatory where such construction is necessary to effectuate the Legislative intent.

California Trust Co. v. Bennett, 33 Cal. 2d 694;
Hochfelder v. Los Angeles County, 126 Cal. App.
2d 370.

B. 1. In enacting Section 24049 of the *Business and Professions Code* and broadening its terms (historically described hereinafter in Paragraph III B 3), the intent of the Legislature has always been to promote public welfare. Public welfare can well be safeguarded by insuring collection of taxes due to the State.

2. In addition to the inherent broad powers of regulation and control granted in the Constitution (Art. XX, Sec. 22), the Legislature expressly gave to the Department the power to insure the collection of taxes where the exercise of the liquor license privilege is involved. Collection of taxes is as important as levy of taxes; and the State has power to compel the collection.

3. The Department, honoring this, uses its power of regulation and control over renewal or transfer of liquor licenses by requiring (a) since 1955, the payment of State taxes, and (b) prior to 1955 (by the State Board), payment of sales and use taxes as condition precedent to transfer of a license.

4. The Assignee performed the condition precedent, and thus the liquor license was transferred to the purchaser, with a gross recovery of \$5800.00 and a net recovery (after payment of taxes) of \$2,398.62 to the estate—a recovery which could not have been had without the payment of taxes.

III.

California Business and Professions Code, Section 24049 Is the Latest Expression of the Legislature and, Therefore, Prevails Over and Is Paramount to California Unemployment Insurance Code, Sections 1701 and 1702 and California Revenue and Taxation Code, Section 6756.

A. When two laws upon a cognate subject, passed at different times, are inconsistent, the later is controlling.

Meyers v. Los Angeles County, 110 Cal. App. 2d 623;

Bank of America v. Fidelity and Deposit Co., 9 Cal. App. 2d 687.

In determining which of two acts relating to the same subject is controlling, the statute last approved, *particularly* if it be a special act applicable to the particular subject, controls on the theory that it is the latest utterance of the Legislature.

Pierce v. Riley, 21 Cal. App. 2d 513;

Coca-Cola Bottling Co. v. Feliciano, 32 Cal. App. 2d 351.

Where two inconsistent laws are enacted at the same session of the Legislature, the last one adopted prevails.

Trinity County v. Mendocino County, 151 Cal. 279.

Even when different provisions of a statute, all passed at the same time, cannot be reconciled, the one that comes last in point of position prevails

People v. Dobbins, 73 Cal. 257

the presumption being that the later part was last considered.

Alameda County v. Dalton, 148 Cal. 246;

In re Roberts, 157 Cal. 472;

In re Harrison Estate, 110 Cal. App. 2d 717.

B. The history of development of the statutes in question is as follows:

1. *Unemployment Insurance Code, Sections 1701 and 1702:*

a. The Statutes of 1935, Chapter 352, Page 1234, Section 46, the first expression on the point, provided that the unemployment insurance tax and unpaid wage claims arising pursuant to *California Code of Civil Procedure*, Section 1204 ranked equally for priority of payment from an insolvent.

b. The Statutes of 1945, Chapter 568, Page 1107, Section 2, amended the earlier Section and provided that the unemployment insurance tax was subordinate to the payment of unpaid wage claims arising pursuant to *California Code of Civil Procedure*, Section 1204.

c. The Unemployment Insurance Code was compiled as a separate code in 1953 and embodied the 1945 statute without any change whatsoever; and Chapter 568, Section 2, hereinabove referred to, became the Code Sections 1701 and 1702. Therefore, since 1945, the *general rule* in the State of California has been that, in cases of insolvency, unpaid wage claims arising under *California Code of Civil Procedure*, Section 1204 must be paid prior to the Department of Employment tax claims.

2. *Revenue and Taxation Code, Section 6756:*

a. The Statutes of 1941, Chapter 767, Page 2314, Section 3, enacted on June 21, 1941, provided that in case of insolvency the sales and use tax due was subordinated to the payment of unpaid wage claims arising pursuant to *California Code of Civil Procedure*, Section 1204. Therefore, since June 21, 1941, the *general rule* in the State of California has been that, in cases of insolvency, unpaid wages must be paid prior to the State Board claims.

3. *Business and Professions Code, Section 24049:*

a. The Statutes of 1941, Chapter 935, Page 2521, Section 1, enacted on July 3, 1941, provides: “. . . the Board may refuse any license when the applicant is delinquent in payment of any taxes owing under this act, the Retail Sales Tax Act of 1933, as amended, or the Use Tax Act of 1935, as amended . . .”

b. The Statutes of 1953 repealed Chapter 330 of the 1955 Statutes, as amended, and, by Chapter 152, enacted the Alcoholic Beverage Control Act. Statutes of 1953, Chapter 152, Page 984, Section 24049, became Section 24049 of the *Business and Professions Code*.

c. The Statutes of 1955, Chapter 1848, broadened *Business and Professions Code*, Section 24049 to include State taxes due under the Personal Income Tax Law, the Bank and Corporation Tax Law, and the Unemployment Insurance Code liability.

d. The Statutes of 1957, Chapter 553, added amendments which resulted in the present code section (paragraph II A, *supra*).

C. Thus, *Business and Professions Code*, Section 24049 clearly appears as the latest and, therefore, controlling expression of the Legislature for the reasons that with respect to:

1. The unemployment insurance taxes: The amendments to *Business and Professions Code*, Section 24049 by the Statutes of 1955 and 1957, which provided for payment of the Department of Employment claim as condition to transfer of license, impliedly repealed, with respect to liquor license businesses, the Statutes of 1945 (codified unto *Unemployment Insurance Code*, Sections 1701 and 1702), which generally subordinated the Department of Employment to the wage lien claimants.

2. The sales and use taxes: Statutes of 1941, enacted on July 3 (Paragraph B 3 a herein), which provided for payment of the State Board claim as condition to transfer of license, impliedly repealed—with respect to liquor license businesses—the Statute of 1941 enacted on June 21 (Paragraph B 2 a herein).

D. Therefore, if for no reason other than the fact that the right to compel payment of taxes due to the State as condition of transfer of license was made law *subsequent* to the establishment of priorities to wage lien claimants, the propriety and necessity of said payments by Assignee is uncontroverted and must be allowed.

IV.

California Business and Professions Code, Section 24049, Applying to a Specific Class, Prevails Over and Is Paramount to California Unemployment Insurance Code, Sections 1701 and 1702 and California Revenue and Taxation Code, Section 6756.

A. A special statute controls over the general

In re Shull, 23 Cal. 2d 745

and specific acts of the Legislature must be held to be controlling over prior existing general statutes

Buena Vista Water Storage District v. Shields,
126 Cal. App. 241.

Even though a general statute may be enacted later, it will not repeal by implication a former statute which is special or limited in application.

Division of Labor Law Enforcement v. Moroney,
28 Cal. 2d 344.

Although the general statute standing alone may include the same matter as the special act, thus conflicting with it, the special act is considered as the exception to the general, *whether enacted prior or later*, unless the special is repealed in words or by necessary implication.

In re Williamson, 43 Cal. 2d 651.

Even though the general statute is later, the special act will prevail in its application to the subject matter so far as coming within its particular provisions.

Ryder v. Los Altos, 125 Cal. App. 2d 209.

B. In our case, there are two general statutes (*Unemployment Insurance Code*, Sections 1701 and 1702 and *Revenue and Taxation Code*, Section 6756) which give, in

cases of insolvency, priority of payment to employees claiming under *California Code of Civil Procedure*, Section 1204 for unpaid wages, superior to payment to the State of unemployment insurance taxes and sales and use taxes, respectively. These statutes apply whether the insolvent operated a retail food market, a furniture store, a shoe store, a dress shop, or any other business whatsoever, *excepting* a business operating with a liquor license issued by the State.

C. Thereafter, the Legislature enacted a special act (*Business and Professions Code*, Section 24049), which applied only to liquor license establishments. This act, applying to one specific group, type, or class—with respect to that particular group, type, or class only—repeals and modifies the general statutes, which grant the top priority to the wage lien claimants. It is true that this special act, applying to liquor license establishments only, was enacted later than the general statutes, but even had it been enacted earlier, it must still prevail under the established law that the special is the exception to the general and prevails as to the subject matter coming within its particular provisions (*In re Williamson, Ryder v. Los Altos, supra*).

V.

Under Assignments for Benefit of Creditors, the Claim of the United States of America Must Be Paid Prior to Payment of Any Other Creditors.

A. The claim of the United States of America is paramount to all others, excepting perfected liens.

“Whenever any person indebted to the United States is insolvent . . . the debts due the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor

having sufficient property to pay his debts makes a voluntary assignment thereof . . .”

31 U. S. C. A., Section 191 (Revised Statutes, Section 3466).

In order to establish priority over the United States of America, there must be in existence a lien claim which has been perfected. The lien must be attached to certain property by reducing it to possession; and where a town's tax lien and the Federal tax lien are general and the taxpayer is insolvent, the Federal tax lien has priority.

United States v. Gilbert Associates, Inc., 73 S. Ct. 701.

Where there were wage claimants of an insolvent corporation which owed Federal taxes and which had executed an assignment for benefit of creditors, the wage claimants did not have,—under *California Code of Civil Procedure*, Section 1204 any specific and perfected lien at the time the government's priority under Section 191 arose; and, thus, the wage claimants were not entitled to priority over the government. In order to have had such priority, the lien must have complied with the following standard: it must be definite as to identity of lienor, as to the amount of the lien, and as to the property to which it attaches.

United States v. Division of Labor Law Enforcement, 201 F. 2d 857.

B. An assignee for benefit of creditors accepts the trust estate as a trustee for the United States of America, and must not pay any debts without first paying the claim of the United States of America. Any Assignee who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and

pays the debts due to the United States of America from such person or estate shall become answerable in his own person and estate to the extent of such payments for the debts so due the United States of America, or for so much thereof as may remain due and unpaid.

31 U. S. C. A., Sec. 192 (Revised Statutes 3467);
Lewis v. United States, 92 U. S. 618.

C. The United States of America had a claim against Vensep, Inc., in excess of \$7,000.00. The Assignee took the assets—and the cash which represented proceeds of liquidation of the assets—under the trust imposed by Section 191 subject to the reasonable disbursements necessary to accomplish the marshalling, conservation, preservation, and liquidation of the assets. The United States of America has not complained of nor objected to the payments required to be made by the Assignee to the State taxing agencies nor to the reasonable disbursements by the Assignee in connection with administration by him of the assignment estate.

VI.

The Wage Claimants Were Not Prejudiced by the Assignee's Disbursement of Moneys.

A. Under assignments for benefit of creditors, wage lien claims are superior to Assignee's fees and expenses and subordinate to the United States claims.

1. When bankruptcy proceedings have not intervened, priority wage claims under *California Code of Civil Procedure*, Section 1204 constitute liens on the assets of an assignment estate superior to the fees and expenses of an Assignee for benefit of creditors,

Division of Labor Law Enforcement v. Stanley Restaurants, 228 F. 2d 420

but the claims of the United States of America are superior to the statutory liens of the wage claimants.

United States v. Division of Labor Law Enforcement, supra.

This applies to general assignments only and not to cases arising under the Bankruptcy Act.

2. The whole of the assignment estate moneys was payable to the United States. The gross receipts in the assignment estate amounted to \$7,061.83. The claim of the United States amounts to in excess thereof. Had the Assignee not expended one cent for expense, payment of taxes, or fees, all of the receipts of the assignment estate being held by him as trustee for the United States, would necessarily have been paid by him to the United States. Under no condition, could there have been any funds remaining for the payment to any of the wage claimants whose claims arose under *California Code of Civil Procedure* Section 1204. Therefore, the said wage claimants, not being prejudiced by Assignee's disbursements, are not proper parties to object to said disbursements, or any portion thereof.

B. In bankruptcy, wage lien claims asserted under Section 67c of the *Bankruptcy Act* are subordinate to administration expenses, under Section 64a(1) of the *Bankruptcy Act*, and wages entitled to priority, under Section 64a(2) of the *Bankruptcy Act*.

1. “. . . though valid against the trustee under subdivision b (employees' liens under *California Code of Civil Procedure*, Section 1204)* of this Section,

*Added.

statutory liens . . . on personal property not accompanied by possession thereof . . . shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision a of Section 64 of this Act . . .”

Bankruptcy Act, Section 67c;

California Department of Employment v. United States, 210 F. 2d 242.

2. Although *California Code of Civil Procedure*, Section 1204 gives a statutory lien to prior wage claimants which may survive bankruptcy

Cheek v. Division of Labor Law Enforcement, 166 F. 2d 429

these are not perfected liens so as to entitle them to be paid before the debts specified in Section 64 of the *Bankruptcy Act*; and, therefore, liens claimed pursuant to *California Code of Civil Procedure*, Section 1204 must be paid after administration expenses and fees (*Bankruptcy Act*, Sec. 64a1) and *after* the wages which may be entitled to priority in payment (*Bankruptcy Act*, Sec. 64a2).

3. Because the lien position of the wage claimants is subordinate to payment of administration expenses and prior wage claims, the objecting wage claimants are not prejudiced by Assignee's expenditures. The State taxes *had* to be paid in order to realize an asset. The remaining moneys, under bankruptcy, amounted to a sum far less than the expenses to be allowed under Section 64a(1) of the *Bankruptcy Act* and the prior wage claims filed under Section 64a(2) of the *Bankruptcy Act*. Thus, inasmuch as no funds could under any circumstance have remained for payment to wage lien claimants, they are not proper parties

to object. Even had the Assignee not disbursed any funds, this would have been true.

C. The wage claimants, claiming under Section 64a(2) of the *Bankruptcy Act*, cannot also assert a lien under Section 67c of the *Bankruptcy Act*.

1. The Division of Labor Law Enforcement filed (Claim No. 27 on file herein), on behalf of Vensep, Inc., employees, claims for unpaid wages amounting to \$7662.95. Said claim was filed under Section 64a(2) of the *Bankruptcy Act* [see Petition *re* Objections to Report and Account of Assignee for Benefit of Creditors and for Order to Show Cause thereon, Tr. of R. p. 23].

The priority under *Bankruptcy Act*, Section 64a(2) is a priority expressly granted by the provisions of the Bankruptcy Act itself and completely separate from and independent of the California State law.

2. Although statutory wage liens under *California Code of Civil Procedure*, Section 1204 may be preserved and may survive bankruptcy (*Cheek v. Division of Labor Law Enforcement, supra*), a claim of lien must be asserted to preserve the lien.

Bankruptcy Act, Sec. 67b.

No such claim was asserted by the Division of Labor Law Enforcement until now.

3. The Court will preserve a statutory lien to do equity, not to do inequity. In *Cheek v. Division of Labor Law Enforcement (supra)*, a debtor had executed a General Assignment for benefit of creditors, and wage claimants filed claims with the Assignee. Within four months thereafter, a petition in bankruptcy was filed and the wage

claimants could not qualify under the priority granted by Section 64a(2) of the *Bankruptcy Act*. They filed claims in the bankruptcy proceedings asserting their statutory lien under *California Code of Civil Procedure*, Section 1204. In order that equity could be accomplished, the Court held that the lien created by *California Code of Civil Procedure*, Section 1204 survived bankruptcy.

Thus, payment could be had by labor claimants who could not qualify under Section 64a(2) of the *Bankruptcy Act* and who otherwise would not have been paid. The Court so decided because it would have been inequitable to penalize labor claimants whose right to priority payment would have been lost by the passage of time. The facts are completely different in our case, where no claim was filed with the Assignee, where the Assignee in good faith made disbursements, and where to find a survival of a lien paramount to the Assignee would work an inequity without benefit to the wage claimant.

4. The priority granted by the *Bankruptcy Act* is separate and different from the priority accorded to the statutory lien created by *California Code of Civil Procedure*, Section 1204. Inasmuch as the Division of Labor Law Enforcement failed, wholly and completely, to assert any priority under *California Code of Civil Procedure*, Section 1204, it cannot now change positions and attempt to revive the statutory lien by asserting it at this time. But even if the statutory lien were to be revived, it would be subordinate to the claims filed under Section 64a2 of the *Bankruptcy Act*; and, thus, subordinate to administration fees and expenses.

D. Wage claimants must take a position—and they have. They have filed under Section 64a(2) of the *Bank-*

ruptcy Act because they can qualify under said Section, and said Section is entitled to payment before any payment of statutory liens. Thus, the wage claimants have elected to file under the rights granted by the provisions of the Bankruptcy Act. No formal claims to a statutory lien were made by the wage claimants herein as in *Cheek v. Division of Labor Law Enforcement* (*supra*).

1. It is manifestly impossible to assert inconsistent positions; but assuming that the wage claimants are permitted to assert for the first time a statutory lien under Section 67c of the *Bankruptcy Act*, that lien must take its position under the Bankruptcy Act, which is subordinate to Section 64.

2. The Division of Labor Law Enforcement cannot say, "Under the law of General Assignments, we were paramount to the Assignee; and under the law of bankruptcy, we are paramount to the United States." The Division must assert its position consistently and claim either under the law of General Assignments, in which case it is subordinate to the United States, or under the Bankruptcy Act, in which case it is subordinate to administration fees and expenses. It cannot claim squarely under Section 64 of the *Bankruptcy Act* and also claim under Section 67c of the *Bankruptcy Act*. Having chosen to file and assert claims under said Section 64, the Division has made its election.

3. Having filed under Section 64 of the *Bankruptcy Act*, which is a proper Section, the Division may not object to the payment of the assignee's administration fees and expenses because such right is not granted to claimants under said Section.

E. As the wage claims were filed under Section 64a(2) of the *Bankruptcy Act* [Tr. of R. p. 23], only those wages, “. . . which have been earned within three months before the date of the commencement of the proceedings . . .” have priority over the general creditors of the bankrupt estate. Here, the Division of Labor Law Enforcement filed claims in the sum of \$7662.85 under Section 64a(2) of the *Bankruptcy Act*, which represents the amount earned by wage claimants ninety (90) days preceding the assignment for the benefit of creditors.

Therefore, in order for the Division of Labor Law Enforcement to assert any priority of payment in the bankruptcy proceedings it can only claim the wages earned ninety (90) days prior to the filing of the involuntary petition in bankruptcy, *i.e.*, July 17, 1957.

F. If the Assignee had not sold the liquor license and it had passed to the bankrupt's estate, the Trustee in Bankruptcy would have been governed by the same law applicable to the Assignee and the Trustee would have been unable to transfer said license without paying the state taxes as a condition precedent thereof.

In re Bay Ridge Inn, 94 F. 2d 255.

Therefore, the Division of Labor Law Enforcement was not prejudiced by the payment of state taxes by the Assignee because the *net* recovery to the bankrupt's estate would have been identical whether the Assignee or the Trustee in Bankruptcy sold the liquor license.

VII.

The Assignment for the Benefit of Creditors Could Not Operate to Transfer the Liquor License to the Assignee. The Labor Claims Can Only Be Asserted Against the Proceeds of the Sale of the Liquor License.

A. A provision in the constitution of a stock and exchange board, whose members are limited in number, and elected by ballot, that a member becoming insolvent, may assign his seat to be sold, and the proceeds shall, to the exclusion of his outside creditors, be first applied to the benefit of the members to whom he is indebted—the purchaser not becoming a member, nor having right to transact business in the board, until he shall be elected by ballot—is not in violation of the bankruptcy act, since upon the bankruptcy of a member, the proceeds of a sale of his seat are not general assets which pass to his assignee.

Hyde v. Woods, 94 U. S. 523, 24 L. Ed. 264, affirming Fed. Cas. No. 6975, 2 Sawy. 255, 10 N. B. R. 54, 1 Am. Law. T. Rep., N. S., 354.

A bankruptcy trustee is not entitled to proceeds derived from selling the bankrupt's membership in the New York Stock Exchange until the bankrupt's dues to, and debts within, the Exchange have been determined by the Exchange's committee and deducted.

In re Gregory (C. C. A. N. Y. 1909), 174 Fed. 629, 98 C. C. A. 383, 27 L. R. A., N. S., 613;

In re Currie (C. C. A. N. Y. 1911), 185 Fed. 263, 107 C. C. A. 369;

Solinsky v. New York Stock Exchange (D. C. A. N. Y. 1919), 260 Fed. 266.

An analogy may be drawn from the foregoing authorities to the case at bar. The courts have held, as hereinbefore cited, that debts owed to fellow members of a stock exchange are to be paid and deducted from the gross sum realized from the sale of a seat on the exchange, and the proceeds thereof, after such deductions, are available to general creditors of the assignor or bankrupt. Thus, the seat on the exchange is charged, under the rules of the stock exchange, with a liability which must be paid in order that any value whatsoever may be affixed thereto on a subsequent sale for the benefit of outside creditors.

Here, the Department of Alcoholic Beverage Control has, pursuant to statute, affixed upon a liquor license the liability of state taxes to be paid before a transfer of the license will be allowed. Without performance of this condition precedent, the liquor license has no value and no creditors, preferred or general, can have any claim upon the value of the license other than the proceeds of the sale after deducting the state taxes.

B. It is axiomatic that in order for there to be preferences or priority for payment from a fund, that there must be an existing fund to which claims can be made.

A general assignment for the Benefit of Creditors carries with it only such property as the assignor is legally capable of transferring or assigning.

Peterson v. Ball, 211 Cal. 461, 296 Pac. 291, 74 A. L. R. 187, followed in 211 Cal. 729, 296 Pac. 300.

A liquor license is a permit by the state to do that which would otherwise be unlawful.

Irvine v. State Board of Equalization, 40 Cal. App. 2d 280, 104 P. 2d 847.

The State has absolute power to prohibit or allow the sale or manufacture of intoxicating liquors.

Foster v. Kansas, 5 S. Ct. 8, 97, 112 U. S. 201, 28 L. Ed. 629, 696.

State of Kansas v. Bradley, 26 Fed. 289.

In *Richards v. Geiger*, 39 App. D. C. 278, the court said that a license to sell intoxicating liquors is a mere permit, personal to the licensee, and is not transferrable unless the right is expressly conferred by statute and then only upon compliance with the provisions of the statute relating to the transfer.

In the Assignment to the Assignee by Vensep, Inc. [Tr. of R. p. 13], it is expressly provided that the Assignee is appointed the agent of the Assignor for the purpose of filing an application for a permit for the sale of the liquor license, and the proceeds of the sale thereof are assigned for the benefit of creditors.

It is the general rule that the rights of creditors are governed by the deed of assignment.

Harrington v. Taylor, 176 Cal. 802, 169 Pac. 690.

Applying this rule, neither creditors of the assignor nor the assignee, can claim any property not *in fact* conveyed by the deed of assignment.

Wilhoite v. Bryant, 78 Cal. 263, 20 Pac. 561.

In the case at bar, the liquor license, as such, never became an asset or property of the insolvent estate of Assignee due to (1) the express terms of the Assignment, and (2) the legal impossibility of assigning or transferring the said liquor license without the consent and ap-

proval of the State of California through its duly appointed agency, the Alcoholic Beverage Control Board.

In the Findings of Fact [Tr. of R. p. 41], made by Honorable Joseph J. Rifkind, it is stated, "That the Department of Alcoholic Beverage Control required payment of said sums (state taxes) as a condition precedent to the transfer of said license." Therefore, the only fund or asset which could be claimed by any creditor of the Assignor, arising from said liquor license, is the proceeds of the sale from which the state taxes were subtracted prior to inclusion in the insolvent estate.

There is no valid question or issue as to the priority or preference of claims against the estate assigned for the benefit of creditors, as there could be no fund for distribution among creditors, arising from the fact that the Assignor possessed a license for the sale of alcoholic beverages, without the approval of the state licensing authority for the transfer and sale of such license. The consent of the Department of Alcoholic Beverage Control was conditioned upon the payment of state taxes and, consequently, only the proceeds of said sale, minus the state taxes demanded by the state licensing authority pursuant to *Business and Professions Code*, Section 24049, can be claimed by creditors of the Assignor. The said liquor license could only have a monetary value as an asset of the insolvent estate based on its market value minus the state taxes required to be paid prior to its transfer.

Business and Professions Code, Section 24049, cannot be construed other than as establishing the mode of realizing an asset for an insolvent estate by payment of state taxes before there is a fund to which priority can be asserted by creditors of the Assignor. A statute will be

construed so that it will be reasonable and consistent with other expressions of the legislature concerning related matters.

Los Angeles County v. Legg, 5 Cal. 2d 348, 55 P. 2d 206.

VIII.

The Assignee Should Not Be Surcharged for Expenditures Made Pursuant to Law and in Good Faith.

There has been no allegation made by either the Trustee or the Division of Labor Law Enforcement that the payments to the state by the Assignee were made fraudulently or in bad faith. There is no issue as to the fact that such payments were made in good faith by the Assignee and pursuant to a valid and existing statute (*Business & Professions Code*, Sec. 24049).

As the trustee in bankruptcy could not have realized any sum in excess of that which the Assignee realized on the sale of the liquor license for creditors, and the payments by the Assignee of the state taxes were made in good faith and pursuant to law, there is no basis to personally hold the Assignee liable for a sum of money which was never a part of the insolvent estate.

Respectfully submitted,

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